different version to the Court. What he has said to the Court will have been recorded so that there is no difficulty as to that. What remains to be proved therefore is the version he has given to the police. A bare admission that he made a statement to the police in no way proves what he said to them. The moment he denies saying certain things which appear in a statement the question of whether he did in fact say those things is in issue and can be resolved only by formally proving the statement, thereby making the person who recorded it available for cross-examination. If he admits that the statement, the actual document, produced is the recording of his statement or if he admits saying what is stated in the statement then no formal proof is required. But nothing less will suffice. As I see it when Taylor J. in *Muthusamy* v. *Public Prosecutor, supra,* talks about a witness denying having made the alleged statement and Briggs J. in *Jusoh bin Awang* v. *Public Prosecutor* [3] refers to where an alleged statement put to a witness is denied, they are not referring to the witness having denied making a statement to the police at all but to the witness denying the making of the statement alleged.

Looking at it from a purely practical aspect this must be so. In the present case D.W. 1 was a Siamese speaking in Malay to a Chinese Inspector who was recording the statement in English. Does this combination not positively invite error?

*Jusoh bin Awang* v. *Public Prosecutor, supra,* and *Osman Khan* v. *Public Prosecutor* [4] are authority for saying that where statements to the police are admitted as exhibits and are used for the purpose of impeaching the credit of witnesses either for the prosecution or the defence without being properly proved it is an illegality.

The admission of these statements, D. 28 and D. 29, was highly prejudicial to the 2nd and 3rd appellants as well as the 1st appellant and the appeals of all three appellants must be allowed, but it was necessary to consider certain further matters before deciding what the final order was to be.

Certain statements were admitted which should not have been. Inspector Choong, P.W. 9 said that the statement which the 1st accused made to him that resulted in the finding of $3,000 was "I kept another $3,000 from the payroll inside a Lactogen tin and placed inside a water tank in my house." This was not objected to at the time but at a considerably later period of the trial. When P.W. 9 was recalled the matter was raised again and the learned President held that the words "from the payroll" should be struck out as inadmissible. It was, however, unfortunate that such prejudicial evidence should have been admitted in the first place.

Then again a detective sergeant, P.W. 18, gave evidence to the fact that a heap of ashes and burnt up things was found as a result of what the 2nd accused said to him. He said that the 2nd accused said to him, "This is the bag that I burnt." Later on in cross-examination by the 2nd accused he said, "This is the burning spot," and then said, "This is the bag which was burnt." Then as if that was not enough in reply to the Court he said the statement which the 2nd accused made that led to the discovery of the heap of ashes and burnt up things was "Try to look on the left side of the road, the bag that contained this money which I burnt." No objection whatever was taken to any of this evidence. The evidence of what the 2nd accused said on this occasion should have been confined to the statement, "This is the burning spot."

In examination-in-chief P.W. 9, Inspector Choong, said that on the 25th June, 1960, at about 12 noon he brought the 1st accused to his house at Chalok. While there he asked the 1st accused, "Have you got any money in the house and if so produce it." P.W. 9 said the 1st accused did not produce any money. It seems to me that this is tantamount to asking the question, "Have you got any money in the house?" and obtaining the reply, "No." The addition of the words in the question "and if so produce it" does not seem to me to alter the inference as to the answer to the first part. It seems to me, therefore, that this evidence should not have been admitted as it was in effect equivalent to a statement to a police officer in the course of an investigation.

I came to the conclusion that as there were a number of other unsatisfactory matters it was not a case in which I should order a re-trial. Accordingly, I allowed the appeals of all three appellants and quashed the convictions and sentences.

*Appeal allowed.*

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## MURUGAPPA CHETTIAR v. CHINNIAH

**[O.C.J. (Ong J.) May 29, 1961]**

**[K.L. — Civil Suit No. 431 of 1959]**

*Land Laws — Registered co-proprietors — One undivided half share subject to charge — Co-proprietor seeking title deeds from chargee for subdivision of land into two separate lots — Building operations by co-proprietor — Chargee becomes co-proprietor by default of chargor — Whether an undivided half share in land creates an ipso facto interest in any house erected thereon.*

In 1946 the defendant obtained permission from the owner of the land in question to build a dwelling house on the front half of the land in consideration of a ground rent of $5. One R. subsequently was granted permission to build another house at the back portion of this same piece of land on similar terms. In 1951 the land was transferred to a new owner and both the defendant and R. continued paying ground rent to the new owner as before. In 1955 the defendant and one W. became the registered co-owners of the said land in undivided equal shares — the plaintiff on the very day of the transfer being registered as chargee of W.'s undivided half share. As W. was unable to pay off the charge, three memorials

were made on the title discharging the existing charge, transferring W.'s interest to one H. and charging the said H.'s undivided half share to the plaintiff. In July 1956 the defendant by letter requested and obtained a surrender of the title from the plaintiff as chargee so that the lot could be subdivided and separate titles issued. Subsequently as a result of default by H. the plaintiff became co-proprietor of the said land. Meanwhile the defendant started building operations on the said land having received the necessary planning permission and approval of the building plan. The plaintiff on later discovering that zoning restrictions on the Town Plan would not permit a second house to be erected on the same plot now claimed as the registered purchaser of an undivided half share in the said land that he is *ipso facto* the owner of a similar interest in any house erected anywhere upon the said land.

**Held:** (1) as the plaintiff had never contributed to the heavy expenditure of the buildings or evidenced any intention of claiming an interest in any accretion to the land but had by his conduct and letters encouraged the defendant confidently to believe that as long as the defendant confined building operations within the limits of his own half the plaintiff intended to seek no benefit, a supervening equity had been raised against him by his conduct;

(2) further, as the defendant had built the house on the faith of an agreement with the plaintiff for partitioning of the land so that each party should be sole owner of the portion under his own exclusive occupation, the agreement was a complete answer to the plaintiff's claim.

*Cases referred to:—*

(1) *Hughes* v. *Metropolitan Rly. Co.* (1876), L.R. 2 App. Cas. 439, 448.

(2) *Central London Pty. Trust Ltd.* v. *High Trees House Ltd.*, [1947] K.B. 130.

(3) *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*, [1955] 2 All E.R. 657.

(4) *Lyle-Meller* v. *Lewis & Co. Ltd.*, [1956] 1 W.L.R. 29.

(5) *Bank Line Ltd.* v. *Arthur Capel & Co. Ltd.*, [1939] A.C. 435, 454.

ACTION.

*Chan Hua Eng* for the plaintiff.

*M. L. R. Doraiswamy Aiyer* for the defendant.

*Cur. Adv. Vult.*

**Ong J.:** This is an action between the co-owners of land of which each party is the registered proprietor in undivided equal shares. The defendant in 1958 had built for himself a dwelling house on the front portion of the land, which had been in his exclusive occupation for the past twelve years. The building operations, which commenced at or about the time that the plaintiff came upon the register as proprietor of an undivided half-share, had been pushed on to completion despite certain warnings given by the plaintiff's solicitors, at some later stage of building operations, as to the legal consequences which might follow if the works were carried out before completion of subdivision. The plaintiff now asks for a declaration that he is owner of an undivided half-share in the premises, and an order for payment of $60 per month being half its rental value.

The land in question is Lot 227, section 96 in the Town of Kuala Lumpur containing an area of 29.75 poles. It is rectangular in shape, measuring approximately 126 feet by 64 feet. It was held formerly under Lease for Agricultural land No. 1339 in perpetuity, and now under Certificate of Title No. 15070. The history of how the parties came to acquire their respective interests in this piece of land is not in dispute; nor are the circumstances leading to the present litigation.

The defendant was a quondam peon employed by the Rubber Research Institute, who in May 1958 retired with his gratuity or savings after about 30 years' service, and decided to rebuild his own house anew. In 1946, while one Richard was proprietor, the defendant had obtained permission to enter and build a dwelling-house on the front half of the land in question in consideration of a ground rent of $5 per month. Subsequently one Ramadas built another house on the back portion of the same lot which he occupied apparently on similar terms. In 1951 one Suppiah bought the land from Richard, and to the new owner both the defendant and Ramadas continued paying ground rent as they did before. Some years later Suppiah desired to recover possession, and in December 1954 the defendant and one Mohamed Salleh jointly agreed with Suppiah to purchase the land from him for $6,500 payable in three instalments. By the time the purchase and transfer came to be completed Mohamed Salleh had dropped out and been substituted by one Wahab. By an agreement in writing dated May 9, 1955 and made between the defendant and Wahab, they agreed to partition the land into front and rear halves of which each should be the sole owner, subject only to a right of way for the owner of the rear portion over the front half. On July 9, 1955 the defendant and Wahab became the registered co-proprietors entitled to the land in undivided equal shares. At this stage the plaintiff came into the scene, being registered on the same day as chargee of Wahab's undivided half-share. This chargor was unable to pay off the charge and, on May 17, 1956, three memorials were made on the title discharging the existing charge, transferring Abdul Wahab's interest to one Hamzah bin Kantan, and charging the latter's undivided half-share again to the plaintiff.

On July 14, 1956 Mr. J. C. Reeves, Secretary of the R.R.I. (who was kindly assisting the defendant in correspondence and other matters connected with his plan to provide a home for himself and his family upon his eventual retirement) wrote to the plaintiff as follows:

" THE RUBBER RESEARCH INSTITUTE OF MALAYA

Ref: Secy. 1/32 14th July, 1956.

Mr. M.R.L. Murugappa Chettiar,
85 Ampang Street,
Kuala Lumpur.

Dear Sir,

**Land at Bungsar Road**

Mr. P. Chinniah who is an employee of this Institute has given us to understand that he is the owner of an undivided half share of a lot of land at Bungsar Road, bearing title No. 15070, of which the other undivided half share is registered in your name, and that the issue document of title is at present held by you.

Mr. Chinniah now wishes to have this lot subdivided and obtain a separate title issued in his name for his share of the lot. We shall therefore be pleased if you will surrender the above title to us when we will make the necessary application to the State Government and arrange for two separate titles issued for each undivided half share at present held; when these are received we will forward to you the document in respect of the portion registered in your own name.

An early reply will be appreciated as, if the issue document of title is handed to us without delay, immediate application will be made by us for survey and subdivision.

It is presumed that all costs of subdivision will be divided between you and Mr. Chinniah. There will be no legal charges over and above the normal fees charged by the Survey Department.

Yours faithfully,
*(Sd.)* J. C. REEVES,
Assistant Secretary.

Copy to:
Hamzah bin Kantan."

On July 16, 1956 the plaintiff, replying to Mr. Reeves' letter of July 14, wrote as follows:

" I forward herewith C.T. No. 15070 which is registered in the joint names of Chinniah and Hamzah bin Kantan.

I am only a chargee over the undivided half-share of Hamzah.

Please acknowledge receipt and give an undertaking as soon as the subdivision is over (to) return the title to me."

On July 25, 1956 Hamzah wrote to Mr. Reeves in these terms:

" With reference to your letter Secy. 1/32 of 21st July, 1956, I am to say that I am the joint owner of Lot No. 227, section 96, in the Town of Kuala Lumpur.

I now give my consent to subdivide the lot into two equal halves on condition that Mr. P. Chinniah gives me a road access on his portion."

What transpired after July 1956 is not clear, except that upon default by Hamzah, the plaintiff took proceedings under section 149 of the Land Code, and then how he came to be co-proprietor is related in the following letter dated August 25, 1958 from the plaintiff's solicitors, Messrs, Shearn, Delamore & Co., to Mr. Reeves:

" We thank you for your letter of the 21st instant referring further to the above matter. The position in this matter is that although the land was put up for sale by auction, no offer to purchase was made with the result that a second application had to be made for another auction to take place. The parties then came to a compromise with the result that the half share of the land was transferred to our client, Mr. L. Murugappa Chettiar in full settlement of his claim. The result is that Mr. Chinniah and our client are now the joint owners of the land. The transfer has only just been registered and we are making arrangements to obtain the document of title to be handed to you in accordance with your undertaking.

We bear in mind the fact that you require the document of title for the purpose of arranging for a subdivision of the land. It has occurred to us however that it might perhaps not be possible for your client to arrange for a sub-division of the land without the prior approval or the agreement of the other registered owner. We understood that no such arrangement was entered into by your Mr. Chinniah with either the previous or the present joint owners. You might perhaps in the meantime care to investigate this point and as soon as we receive the document of title, which we hope very shortly, we shall send the same to you.

We must stress however that the document of title should be equally available to our client for any purpose for which he will require the same."

In the meantime plans for his new house had been submitted by the defendant to the Municipality, and it would appear from these plans (Ex.D.16 and D.17) that Planning permission was granted on July 24, 1958 and the Building Plan approved on September 18, 1958. As required by the Municipal authorities, the Building Plan had been signed by both the then registered co-proprietors, namely, the defendant and Hamzah.

In September the plaintiff's agent, Narayanan Chettiar, said he made an inspection visit and found building operations under way. He told the defendant that he should not put up his house until sub-division of the land had been effected, but defendant was apparently determined to carry on. The defendant's version of what took place at or about this time was that the plaintiff in person, accompanied by his agent and a surveyor named Pereira came and took measurements, as a result of which they complained of an encroachment upon the plaintiff's half-portion, and caused the defendant to demolish certain drains and other works in order that the building would stand entirely on defendant's own portion of the land. Of the two conflicting versions I accept that of the defendant who, I am satisfied, was stating what to the best of his recollection he honestly believed to be true. That his version is the closest approximation to the truth is borne out by two passages in letters of even date, October 3, 1958, written by the plaintiff's solicitors to the defendant and Mr. Reeves respectively. Although the letter to defendant contained a warning that he would be building at his own risk because plaintiff's undivided half-share in the land would entitle him to a half-share also in any houses erected on the land, there was a passage therein which specifically raised the matter of encroachment in these words:

" It has come to our client's knowledge that you are proposing to erect a house upon the above land in spite of the fact that this land is to be subdivided in accordance with your own wishes. We are also given to understand that should this house be erected, it would be impossible to subdivide the land in as much as the proposed house would be situated partly on one half and partly on the other."

In the other letter to Mr. Reeves appears the following passage:

"You will see, and we are sure you will agree that should Mr. Chinniah persist in his plan to erect a house on the land before sub-division is completed, when he may then build entirely on his own land, he will in fact be making a present of half his house to our client."

The same letter continues as follows:

"We enclose herewith the document of title required by you and we must stress that it is given at your request to enable Mr. Chinniah to apply for subdivision of the land and on the express understanding that should our client for any purpose require the same, providing it is still in the hands of your client, and not with the Registrar of Titles, you will let our client have it upon request."

One important fact emerges with crystal clarity — notwithstanding the second paragraph of the letter of August 25 (Ex.P4) — namely, that the plaintiff himself, far from objecting, was in full agreement with the defendant on the scheme of sub-division, which had been previously agreed upon between the defendant and the plaintiff's predecessors in title. Indeed the document of title was handed over for that very purpose.

On October 8, 1958 the defendant replied to Messrs. Shearn, Delamore & Co. I quote only the relevant passages:

"My house crumbled down and hence I had to reconstruct my house. I had a plan drawn up and the owners of the half share land behind my plot gave their consent by signing in the plan. Then I approached the Municipality with the plan and that was approved and passed. The construction of the house was started and now it is nearing completion.

I have not infringed the half-share land pledged to Mr. L. Murugappa Chettiar. If there is any doubt regarding this, anybody is welcome to inspect the facts. There are valid documents and records to establish my claim to the half-share land on the south. The building and fixtures are not in any way occupying any place in the other half-share plot now the property of Mr. L. Murugappa Chettiar."

That letter apparently set inquiries in train which led to plaintiff's discovery, only then, that zoning restrictions in the Town Plan would not permit a second house to be erected on the same lot. Thus, on October 11, the plaintiff's solicitors wrote to the defendant their letter, Ex.P7, of which the relevant passage is in these terms:

"In view of the disadvantage which will accrue to our client in the sense that the construction of the house will materially affect any plan for sub-division as we understand that the area is zoned for one house to one lot, we must warn you that unless you cease building operations immediately, our client will take up proceedings for an injunction against you forthwith."

The plaintiff took no steps to apply for an injunction, the building progressed to completion, and further correspondence ensued which led nowhere towards solving the impasse; finally, after demands by the plaintiff for a monthly rent of $60 had been rejected, the plaintiff commenced this action. I think one more letter may be usefully referred to for completing the picture, viz., that of January 24, 1959 by the plaintiff's solicitors to Mr. Reeves:

"We write with further reference to the above matter and to inform you that we have just held a conference in our office between Mr. Murugappa Chettiar, P. Chinniah and ourselves in an effort to arrive at a solution to the problems of both parties.

We have satisfied ourselves that it would not be possible for a line to be drawn through the middle of the piece of land so that a sub-division could consequently take place and a half portion thereof being given to our client. The reason is that our client has been to the Municipal Offices and has ascertained that in accordance with the zoning condition in that particular area, not more than one house will be allowed to be erected on that land. The result of a sub-division would be that where Mr. Chinniah already has a house upon his land, our client will thereafter be unable to erect anything on his piece of land with the result that that same piece shall thereafter become worthless.

We presume that the fact that he has not been able to negotiate the sale of his half portion of the land was principally due to this drawback. It would seem therefore that the only person who would benefit from the purchase of our client's half share would be Mr. Chinniah.

We trust that you will appreciate that our client came into this purely as a matter of accident and not by design. They are in fact quite eager to be free from the complication involved at the moment and we are certain that if a reasonable price be offered to our client for his undivided half share, he would sell the same without any hesitation.

It may be possible for you to induce Mr. Chinniah to purchase the same in view of the undoubted advantages he will acquire from such a transaction.

Our Mr. Chan would be happy to discuss this with you over the telephone at your convenience."

In his statement of claim the plaintiff has thought it sufficient only to plead that the defendant, without his permission, had built the premises, No. 14A Kampong Maarof, on Lot 227, which is owned by them equally in undivided shares, and that the monthly rental value of the premises is $120. His cause of action, therefore, is simply this: that because he is the registered proprietor of an undivided half-share in the whole of Lot 227, he is *ipso facto* the owner of a similar interest in any house erected anywhere upon that land. He rests his claim, as of course, upon the definition of "land" in the Land Code for providing the root of his title to the house itself. In my opinion this is a complete fallacy. It is trite law that the house forms part of the land and cannot be severed therefrom so as to come under different ownership from the land on which it stands. The plaintiff's purpose in this action, however, is not to seek a declaration of trite law, but a declaration of his beneficial ownership of half the house. In this respect I think a supervening equity has been raised against him by his own conduct. He had never contributed even the cost of one brick towards the building, or, by any offer or attempt to share the cost, evinced any intention of claiming an interest in any accretion to the land. On the contrary, he had at all relevant times up to as late as October 11, 1958, by his conduct and by his letters, encouraged the defendant confidently to believe that, so long as the defendant confined building operations within the limits of his own half, the plaintiff intended to seek no benefit for himself therefrom. The defendant had incurred heavy expenditure on the faith of such assurances

and they must be held binding on the plaintiff. This is in accordance with the principle expressed by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.* (1) in these words:

"It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results.....afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

In another form the same principle was applied in *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (2), *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* (3), and *Lyle-Meller* v. *Lewis & Co. Ltd.* (4), where it was laid down that if an assurance was intended to be acted upon, and it was acted upon by one party who altered his own position on the faith of it, it must be held binding on the other. In my judgment the action must on this ground alone be dismissed with costs.

A further ground for dismissing this action is that, on the evidence, it is clear beyond peradventure, by the letters of July 14, 1956 and August 25, 1958, that the plaintiff, both as chargee and as a co-proprietor, had in fact agreed to a subdivision or partitioning of the land into two equal portions so that the front half should remain in the defendant's occupation. The allegation that the house was erected without the plaintiff's permission is completely false. That lie is conclusively nailed by the delivery to defendant on October 3, 1958 of the document of title with a warning against any encroachment of the building then in progress upon the plaintiff's own portion. I accordingly find as a fact that the defendant had built his house on the faith of an agreement with the plaintiff for partitioning of the land so that each party should be sole owner of the portion under his own exclusive occupation. Such an agreement affords a complete answer to the plaintiff's claim.

The letter of January 24, 1959 leaves no room for misapprehension as to the reasons which caused the plaintiff to institute this action. His discovery of the zoning restrictions, however, affords no ground for his resiling from the agreement. I am reminded of the words of Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co. Ltd.* (5) that "Rights ought not to be left in suspense or to hang on the chances of subsequent events." The simple truth is that the plaintiff had been disappointed in his expectations of profit from his investment. It is not due to any default on the part of the defendant. This attempt by an opulent moneylender such as the plaintiff to recoup his losses at the expense of the little man in the circumstances of the defendant is heartless and unconscionable, and I am greatly relieved not to find myself obliged to make any order to assist the plaintiff in his salvage operations. The claim is accordingly dismissed, with costs to be taxed against the plaintiff on the higher scale.

*Action dismissed.*

Solicitors: *Shearn Delamore & Co.; Doraiswamy Aiyer & Kok Thoy.*

## MALBAI v. NAWI

[A.C.J. (Rigby J.) June 23, 1961]

[Penang — Civil Appeal No. 1 of 1961]

*Tort — Assault — Claim for damages for personal injuries caused — Assault by two persons — Compromise with one — Whether compromise bar to action against the other.*

For a defendant to be able to avail himself of the general rule that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all, it is not sufficient to show that there was a similarity of design on the part of the defendants causing independent damage. What must be proved is that there was concerted action towards the common end.

*Case referred to:—*

(1) *Duck* v. *Mayeu*, [1892] 2 Q.B. 511 at p. 513.

CIVIL APPEAL.

*Triptipal Singh* for the appellant.

*David Choong* for the respondent.

*Cur. Adv. Vult.*

**Rigby J.:** This is an appeal from a decision of Mr. Au Ah Wah, the then President of the Sessions Court, dismissing the plaintiff's claim against the defendant for damages for personal injuries sustained by the plaintiff at the hands of the defendant.

The facts are relatively simple. An angry exchange of words, culminating in a fight, took place between the plaintiff and the defendant in front of the plaintiff's premises at Gurney Drive on the afternoon of the 10th October, 1959. At some stage in the fight one Mat Yusi bin Mawal, a nephew of the defendant, intervened on his behalf, and at some stage, whether in the course of the actual fight between the plaintiff and the defendant, or after that fight had actually terminated, Mat Yusi himself assaulted the plaintiff. The plaintiff said in evidence that the defendant struck him with a piece of iron over the right eye. The plaintiff was admitted to hospital and, upon examination, he was found to have a big linear cut on the right eye-brow. His nose was swollen and he was bleeding from it. An X-ray examination disclosed a fracture of the nasal bone. The medical report also shows, incidentally, that he was found to be suffering from tuberculosis of the lungs. He remained in hospital for 10 days. As a result he lost his employment and was unemployed for two